TAI LEE FINANCE CO. SDN. BHD.

v.

THE OFFICIAL ASSIGNEE OF THE PROPERTY OF NGAN KIM YONG & ORS.

FEDERAL COURT, IPOH
WAN SULEIMAN FJ
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 111 OF 1981]
4 OCTOBER 1982

LAND LAW: *Application for sale of land under charge - Effect of notice of sale agreement entered into prior to charge - Whether chargee's registered title affected - Indefeasibility of title - Whether affected - Fraud - Whether actual or constructive - Sections 340(1), (2) National Land Code - Onus of proof.*

The 1st respondent (the chargor) the registered proprietress of the land in dispute executed two charges over the land in favour of the appellants to secure payment of two loans. The charges were registered. On the chargor failing to comply with a notice of demand in Form 16E under s. 255 of the National Land Code, the appellant applied for an order for sale, which was finally heard in open Court. The application was dismissed. The appellants appealed.

There was no dispute to the facts that the respondents (2nd to 7th) had entered into sale agreements with the chargor about 3½ years prior to the execution of the charge and had been in possession since about the time the charges were created. The respondents however alleged that the appellant was bound to have made proper inquiries regarding the land and the building and that its failure to do so constituted constructive notice of the sale agreements and the beneficial rights of the respondents, that the appellant was party or privy to the fraudulent acts of the chargor and that the conduct of the appellant amounted to fraud which defeated the appellant's titles and interests in the land.

Held:

[1] In the light of the affidavit evidence produced by the respondents viewed in its totality, at the most the appellant had constructive notice of the respondents' prior beneficial interest. However, mere knowledge of an unregistered interest cannot of itself be imputed as fraud within the meaning envisaged by s. 340.

[2] The respondents had not proved beyond any reasonable doubt that the appellant had acted dishonestly, wilfully and consciously disregarding or violating the right of the respondents or in any way in collusion with the chargor. The onus was upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud, but actual fraud.

[3] The question of existence or otherwise of fraud is one of fact to be determined in the light of the facts and circumstances surrounding each particular case.

[Appeal allowed.]

Cases referred to:

Tueh Guat Choo alias Tin Wat Choo (f) v. Cheah Ah Hoe and Yong Pow Meng [1932] MLJ 109
Assets Company Ltd. v. Mere Roihi [1905] AC 176
Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited [1926] AC 101
Fels v. Knowles 26 NZLR 604
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 25

P.J.T.V. Denson (M) Sdn. Bhd. & Ors. v. Roxy (Malaysia) Sdn. Bhd. [1980] 2 MLJ 136
Saminathan v. Pappa [1981] 2 MLJ 121
Narayanan v. Oficial Assignee, Rangoon [1941] AIR PC 93
Public Finance Bhd. v. Narayanasamy [1971] 2 MLJ 32

Legislation referred to:
Land Code 1926, ss. 42, (i), (ii)
Land Transfer Act 1915 (New Zealand), ss. 58, 196, 197
National Land Code 1965, ss. 255, 340(1), (2), 349(1)

For the appellant - R. R. Chelliah (Vincent Ng with him); M/s. Ng & Co.
For the respondent (Official Assignee) - A. Aziz, FC
For the 2nd to 7th respondents - J.R. Devadas; M/s. Devadas & Co.

JUDGMENT

Abdul Hamid Omar FJ:

The appeal is against the decision of Anuar J dismissing the appellant's application for sale of land held under Grant for land Nos. 3735 and 3736 for Lots Nos. 7355 and 7356 respectively in the Township of Ipoh ('the said land') by public auction to realise all moneys due to the appellant (chargee) under Charge Presentation No. 1672/70 and 1673/70.

The facts not in dispute are carefully set out in the written judgment of the learned Judge. The 1st respondent Ngan Kim Yong (chargor) the registered proprietress of the said land executed two separate charges over the said land in favour of the appellant on 4 February 1970 and 10 March 1970 respectively to secure the repayment of two loans of RM90,000 and RM20,000 on 17 March 1971. Both charges were registered.

Notice in Form 16E under s. 255 of the National Land Code demanding payments of both loans was given on 17 February 1971. The chargor failed to comply with it. Thereupon the chargee applied for an order for sale of the said land and obtained an order in default of appearance. The order was however set aside upon successful application by the 2nd to 7th respondents (the respondents) that they be joined as co-respondents.

The appellant's application was again heard on 11 September 1972 and an order for sale was granted. On 20 August 1973, on appeal the Federal Court set aside the order and further ordered that the case be remitted back to the High Court for the application to be heard in open Court. It was heard on 14 May 1981. The application was dismissed.

It is also not in dispute that the chargor was a land developer. For consideration he entered into an agreement with each of the respondents 2nd to 7th to build houses for them. These agreements were entered into during the second half of 1966. When the respondents became aware of the charge sometime in the month of August 1970 they lodged the caveats.

The respondents opposed the appellant's application for an order for sale on the ground that the appellant had failed to make all necessary and proper inquiries both as regards the land and the building erected thereon before the execution of the charges. They contended that if proper inquiries had been made the appellant would have discovered that the chargor had entered into sale agreements with them. They also contended that the appellant ought not to have relied solely on the normal searches on the titles in the Registry of Titles which revealed no encumbrances except for a charge on each title in favour of Public Bank Bhd.

The learned Judge was of the view that the appellant had not carried out sufficient investigation into the nature of the land, the subject matter of the charge. If there had been careful inquiries the appellant would have discovered that the buildings on the land had been sold to the respondents.

The learned Judge held that the appellant had constructive notice of the respondents' interest in the land, as at the time the charge was executed the chargor was bound by contract to sell the land to the respondents.

The learned Judge further held that the appellant's demand for sale of the land in the face of such notice is unconscionable and constituted a fraud on the respondents. It is also his finding that "by virtue of s. 340 of the National Land Code the title of the registered proprietor of the land shall not be indefeasible where there is fraud to which he is a party." The learned Judge accordingly dismissed the application.

Mr. R.R. Chelliah Counsel for the appellant raised a number of grounds which may be briefly stated as follows:

(a) whether the appellant had constructive notice of the respondents' interest in the land (ground 1);

(b) whether the demand for sale by the appellant in the face of the notice was unconscionable and constituted a fraud: Was the appellant a party to the fraud? (grounds 2,3 and 4);

(c) whether the purchase agreement conferred upon the respondents equitable title or merely equitable interest in the land (grounds 5,6 and 7);

(d) whether constructive notice or constructive fraud, if any, is enough to defeat the appellant's title (ground 8).

Before dealing with these grounds, we would observe that there is no dispute that the respondents had entered into agreements with the chargor about 3½ years prior to the execution of the charges in favour of the appellant. The respondents made payments towards the purchase price but still owed a portion of it.

We would also observe that the respondents were given possession of the premises sometime in February 1970 when the chargor handed the keys of the premises to them.

The respondents have stressed that - (a) the chargor, without the knowledge and consent (allegedly in breach of the agreement), entered into an agreement with the appellant and used the said land as security; and (b) the chargor, at all material times, was a developer of the said land and his business was to build houses or flats for sale at a profit.

The respondents' reply to the appellant's submission that it had acted, on the face of the Register in the Registry of Titles, honestly and without knowledge of any prior interest, is that the appellant was bound and ought to have made proper inquiries as regards land and building erected thereon before negotiating. An inquiry would have led to the discovery of the building. In turn the appellant would have discovered the occupants, the agreement and the beneficial interest of the respondents. It is submitted that by reason of the appellant's failure to make such inquiries or alternatively, of its deliberate omission to do so for purpose of avoiding notice of these matters, it should be deemed to have had constructive notice of the sale agreements and the beneficial rights of the purchasers thereunder.

It is also submitted that at the date of the execution of the charges the appellant was a party or privy to the fraudulent acts committed by the chargor. Furthermore the conduct of the appellant amounted to fraud by reason of which its rights, title and interest in the said land are defeasible.

Now the law: the position is that upon registration of a charge the law confers indefeasible title in the chargor (s. 349 (1) National Land Code) but shall be defeasible in cases provided under sub-section (2) of s. 340. For convenience, we reproduce hereunder both sub-sections (1) and (2) of s. 340 of the National Land Code:

> 340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible -
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

We now examine the respondents' case. It would seem to us that their case depended on whether there was fraud within the meaning of sub-section (2) of s. 340 of the National Land Code. It was founded on the basis of constructive fraud alleging that the appellant had constructive notice of their prior interests. On the material before the Court the learned Judge did conclude that the appellant had constructive notice of the respondents' interest in the land. The appellant's contention however is that mere constructive notice is insufficient. There must be actual fraud to defeat a person of his title or interest.

The case in point cited by the appellant is *Tueh Guat Choo alias Tin Wat Choo (f) v. Cheah Ah Hoe and Yong Pow Meng* [1932] MLJ 109. The relevant section in that case was s. 42 of the Land Code 1926 which provided that

> (i) the title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided; (ii) In the case of fraud or misrepresentation to which he is proved to be a party, the title of such proprietor, chargee of lessee shall not be indefeasible.

Gerahty J in his judgment accepted as authority what was laid down in *Assets Company Ltd. v. Mere Roihi* [1905] AC 176 that fraud in actions seeking to affect a registered title means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud. In arriving at his decision Gerahty J compared the wording of s. 58 and s. 196 of the Land Transfer Act 1915 (New Zealand) and the wording of s. 42 of the Land Code 1926 and concluded that "fraud" as used in the latter bears the same meaning as in the former, Gerahty J also quoted a passage from the judgment of Lord Lindley in *Assets Company Ltd. v. Mere Roihi* at p. 210 where it is stated

> the mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

We have, for purposes of the present case, examined the wording of s. 42 (i) and (ii) of the Land Code 1926 and s. 340 (1) and (2) of the National Land Code and do find that though the words used in both these sections are not the same we are of the view that the meaning they bear, in short their legal effect, cannot be said to be different. The law is therefore settled that while sub-section (1) of s. 340 makes it abundantly clear that the title or interest of a registered proprietor which includes a chargee shall be indefeasible, such title or interest,

however, by reason of sub-section (2), shall not be indefeasible in a case of actual fraud involving, to borrow the words used in *Assets Company Ltd. v. Roihi* quoted: "dishonesty of some sort, not what is called constructive or equitable fraud."

It is also to be noted that although under s. 197 of the Land Transfer Act 1915 (New Zealand) there is provision to the effect that "the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.", we are nevertheless of the view that "fraud" as used in s. 340 of the National Land Code, despite the absence of a provision equivalent to that of s. 197 of the Land Transfer Act 1915 (New Zealand), must be actual fraud and mere knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud within the meaning envisaged by s. 340.

The principle underlying the provision of our National Land Code particularly on the effect of registration affecting the title or interest of a registered proprietor is basically similar to that set out in *Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited* [1926] AC 101 at p. 106 cited from a passage in the Court of Appeal case of *Fels v. Knowles* 26 NZLR 604 at p. 620 as follows:

> The cardinal principle of the statute is that the register is everything, and that except with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

Moving closer home, our Courts in *Doshi v. Yeoh Tiong Lay* (1975) 1 MLJ 25 held that

> the doctrine of constructive notice is inapplicable to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration and the Court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land.

Gill CJ Malaya, delivering the judgment of the Court relying on *Assets Company Limited v. Mere Roihi* at p. 88 stated thus:

> But it is clear that 'fraud' within the meaning of the National Land Code means actual fraud and not what is known as constructive or equitable fraud. (See *Assets Company Ltd. v. Mere Roihi* and *Tueh Guat Choo alias Tin Wat Choo (f) v. Cheah Ah Hoe and Yong Pow Meng).*

In another case *P.J.T.V. Denson (M) Sdn. Bhd. & Ors. v. Roxy (Malaysia) Sdn. Bhd.* [1980] 2 MLJ 136, Raja Azlan Shah CJ Malaya at p. 138 emphasised that:

> As it stands the registered title of the said land in the hands of the second and third appellants is indefeasible. The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud (see s. 340(2)(a) of the National Land Code) ...
>
> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, i.e. dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is the same in all Courts, but such expressions as 'constructive' are...inaccurate:' but 'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled.' (per Romilly MR in *Green v. Nixon* [1857] 23 Beav. 530 & 535; 53 E R 208. Thus in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* it was said that 'if the designed object of a transfer be to cheat a man of known existing right, that is fraudulent ...

On the authorities referred to, it is clear therefore that the question of existence or otherwise of fraud is one of fact to be determined in the light of the facts and circumstances surrounding each particular case. The onus is upon the person alleging fraud to prove fraud not on a balance of probabilities but beyond reasonable doubt [see *Saminathan v. Pappa* [1981] 2 MLJ 121 at p. 123 citing *Narayanan v. Official Assignee, Rangoon* [1941] AIR PC 93].

In the instant case the respondents sought to establish fraud on affidavit evidence. They claimed that the appellant failed or omitted to make proper inquiries by reason of which the appellant had not discovered the beneficial interest of the respondents. The respondents argued that if the appellant had caused proper investigation to be made it would have had notice of such beneficial interest, in other words, it would have had constructive notice of it. Upon such premises the respondents have contended that there was constructive fraud.

The learned Judge did hold that the appellant had constructive notice but had failed to make any finding that there was fraud committed by the appellant prior to or at the time of registration to which he was a party or privy. The only finding by the learned Judge that there was constructive fraud was when he held that the appellant's demand for sale of the land on the face of such notice was unconscionable. The demand for sale was subsequent to the registration and could not therefore have constituted a fraud of the kind envisaged by s. 340 of the National Land Code. To prove fraud the Court must be satisfied that the circumstances in which the appellant obtained registration of the charge were such that they constituted fraud. The onus is on the respondents to establish fraud of the chargor (1st respondent) to which the appellant was a party or privy and it ought to have been committed prior to or at the time of registration of the charge. The fraud complained of must be that which resulted in registration of the chargee i.e. the fraudulent party. And to render the interest of the registered owner of the charge defeasible the fraud must be brought home to him. Although the learned Judge had not made any such finding, we are entitled nevertheless to consider whether, if any, there was fraud.

The question for consideration is whether the chargor can be said to have committed fraud if he, after entering, into agreements with the respondents thereby vesting upon them the beneficial interest of the lands, subsequently executed a charge in favour of the appellant without the consent or knowledge of the respondents (the prior unregistered holders of the beneficial interest). In our view the chargor could be held to be guilty of fraud if the designed object of the charge was to defeat the prior beneficial interest. But whether or not the chargor was guilty of fraud depended on the circumstances surrounding. It is primarily a question of fact.

The evidence before the Court in the present case did not reveal the exact number of persons with whom the chargor had entered into agreements for the sale of the flats or houses. The number of flats or houses that were built upon the said land was also unknown. It is not in dispute the chargor was a developer but evidence shows that there was already a prior charge in respect of the said land to Public Bank Bhd. And for a developer to execute a charge or charges to secure loans for purposes of development is not an uncommon practice. In the light of the circumstances of this case we are of the view that had the learned Judge properly considered whether there was fraud to which the appellant was a party or privy and whether such fraud resulted in the registration of the chargee it is improbable that he would have come to the conclusion that the designed object of the charge was to defeat the prior beneficial interest of the respondents.

As we stated earlier, the essential question that must be determined is whether the appellant was a party or privy to any fraud the chargor was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving "dishonesty - a wilful and conscious disregard the violation of the right of other persons." *(Waimiha Sawmilling Company, Limited v. Waione Timber Company, Limited.)*

In the light of the affidavit evidence produced by the respondents viewed in totality, we can only conclude that at the very most the appellant had constructive notice of the respondents' prior beneficial interests. There is no evidence with which we can satisfy ourselves that there was fraud to which the appellant was a party. In our judgment the respondents had not proved beyond any reasonable doubt that the appellant had acted dishonestly, wilfully, and consciously disregarding or violating the right of the respondents or in any way in collusion with the chargor.

Counsel for the respondents has urged the Court to hold that there was fraud relying upon *Denson's* case. The facts in that case are entirely different from this case. In that case Raja Azlan Shah CJ found upon true perspective of the facts "fraud had been brought home to the persons whose registered title is impeached."

The respondents are also relying on *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32. This was a case where the transferee in collusion with the transferor acted to disregard unregistered (and imperfected by caveat) interests of third parties and it is therefore distinguishable from the present case.

We do not think there is anything we could usefully add except to say that for the above reasons we must with respect allow the appeal with costs and set aside the order dismissing the application and substitute therefor an order allowing the appellant's application. The appellant is to take out summons for direction for the Court to fix the date of sale, reserve price and give other directions. Caveats are to be removed. Deposit shall be refunded to the appellant.

Also found at [1983] 1 CLJ 183